U.S. Department of Labor

Office of Administrative Law Judges
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In the matter of	:	
	:	
STEPHEN MEDURA,	:	
Claimant,	:	
	:	**Case No. 1999-LHC-1859**
v.	:	
	:	**OWCP No. 04-033124**
TARTAN TERMINALS, INC.,	:	
Employer,	:	
	:	
SCHAFFER COMPANIES, LTD.,	:	
Carrier/Servicing Agent, and	:	
	:	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,	:	
Party-in-Interest.	:	

Appearances:

Myles R. Eisenstein, Esq, Baltimore, MD, for the Claimant

William H. Kable, Esq, Baltimore, MD for the Employer

BEFORE: PAMELA LAKES WOOD
Administrative Law Judge

DECISION AND ORDER GRANTING BENEFITS IN PART AND DENYING BENEFITS IN PART

This is a claim for compensation under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. Sec. 901 ***et seq.***, ("the Act"), and the applicable regulations at 20 C.F.R. Sec. 701 ***et seq.*** The Claimant, Stephen Medura ("Claimant"), was employed as a "gear man" by Tartan Terminals, Inc. ("Employer); the Schaffer Companies, Ltd. ("the Insurer"), is the carrier/servicing agent handling this claim on behalf of the Employer. This claim arises from an accident, which occurred on April 25, 1995, when the Claimant slipped and twisted his right knee. The Claimant also seeks benefits based upon an exacerbation of his preexisting back condition, as a result of

Claimant's gait due to his knee injury.

A hearing in the instant case was held before the undersigned administrative law judge in Baltimore, MD, on October 4, 1999.[1] At the hearing, both parties were given an opportunity to introduce testimony, offer documentary evidence, and make arguments. Claimant's Exhibits ("CX") 1 through 12 and the Employer's Exhibits ("EX") 1 to through 20, including subparts, were admitted into evidence. (Tr. 10-26, 69-71, 143-155). [2] The Claimant and Douglas F. Wagner Jr., president of Cargo Local 333 in the Port of Baltimore, testified on behalf of the Claimant. (Tr. 26-130). Bill Dewan and Richard Michael Dyer, investigators who produced three surveillance tapes of the Claimant, testified on behalf of the Employer. (Tr. 134-154). At the termination of the hearing, the record closed and the parties were allowed 90 days to submit post-hearing briefs. (Tr. 156-158). Both Employer and Claimant submitted timely post-hearing briefs, that were filed on December 28, 1999 and January 3, 2000, respectively.

STIPULATIONS

During the hearing, the parties stipulated to the following (Tr. 8-9), and I find:

1. This claim arises under the jurisdiction of the Longshore and Harbor Workers' Compensation Act.

2. The Claimant sustained an injury arising out of and in the course of his employment with Employer, Tartan Terminals, Inc., on April 25, 1995.

3. The injury involved Claimant's right lower extremity.

4. An employee/employer relationship existed between the parties at the time of the accident.

5. The Claimant was temporarily totally disabled from November 19, 1996, to May

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[1] References to the transcript of the October 4, 1999 hearing appear as "Tr." followed by the page number. With respect to individual exhibits, page references will relate either to deposition transcript pages or numbered pages within the exhibit, depending upon context.

[2] All subparts of Claimant's Exhibit 5 were admitted into evidence, but all the subparts were not identified for the record. CX 5(h) is a letter dated May 1, 1995 from Dr. Kate Tobin summarizing the results of April 29, 1995 x-rays and CX 5(i) is an August 21, 1995 letter from Dr. W. Lawrence Greif reporting the results of an MRI conducted on August 18, 1995.

18, 1997 inclusive.[3]

6. Claimant's temporary total disability rate of compensation is the maximum rate for that period, $760.92.

7. The Claimant's average weekly wage at the time of the accident was $1,447.82.

ISSUES

The issues generally relate to nature and extent of disability, and specifically include the causal relationship between Claimant's back condition and his April 25, 1995 accident, entitlement to medical benefits for treatment of the back condition, Claimant's entitlement to additional temporary total disability benefits, his entitlement to additional permanent partial disability benefits for a schedular knee injury, his entitlement to permanent total disability benefits, establishment of loss of wage earning capacity, and Employer's entitlement to special fund relief under section 8(f) of the Act.[4]
(Tr. 9-10; Parties' Forms LS-18; Parties' Prehearing Statements; Claimant's Post-Hearing Memorandum; Post-Hearing Brief on Behalf of Tartan Terminals, Inc.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

HEARING TESTIMONY

Claimant's Testimony

Stephen Medura, of Baltimore, MD, was born on August 19, 1944. EX1 at 5 (the Claimant's claim form for worker's compensation). The Claimant was 55 at the time of the hearing. (Tr. 26.) Claimant testified that his formal education ended before he completed the seventh grade, but he earned credit for some additional grades by taking an equivalency exam in the 1960s. (Tr. 47-48.) Claimant has no difficulty reading, but he

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[3] Claimant agrees that Employer has paid compensation for that period. Claimant's Post-Hearing Memorandum at p. 3.

[4] Although Claimant has indicated that there is an issue as to whether there was a tender of payment, so as to entitle the Employer to a credit for an alleged payment of $48,935.07, based upon Employer's mailing of certain checks to the Claimant (***see*** Claimant's Post-Hearing Memorandum at 5 to 8), I do not find this to be an issue in view of the agreement by the parties that the checks were never signed, endorsed or negotiated by Claimant. (Tr. 21-24). Employer, while mentioning that it "challenged whether the Claimant was entitled to any additional benefits since all temporary total and permanent partial disability benefits were voluntarily paid", has not alleged entitlement to any credit in its Post-Hearing Brief (at page 20). Such a position would, in any event, be frivolous.

described his mathematical skills as "fair" and his ability to spell as "terrible." (Tr. 66-67.) He has no computer skills. (Tr. 99.)

Claimant testified that he worked as a longshore worker for 36 years before he retired in 1998. (Tr. 26-27). Longshore work is the only kind of work he has ever done. (Tr. 40.) His last job as a longshore worker was as a "gear man" at Tartan Terminals, Inc., which entailed maintaining the pier and supplying equipment used to discharge or load cargo. (Tr. 37-38). As a gear man, Claimant would retrieve the equipment from a gear room and load it on a truck or a tractor before transporting it to the ship. (Tr. 39.) To accomplish those tasks, he would lift such equipment as chains, hooks, shackles, bars, head clamps, ladders and air bottles, which varied in weight from 2 pounds to 150 pounds. (Tr. at 38-39). In addition to a great deal of lifting, the Claimant had to climb spreaders numerous times during the process of attaching the spreaders to hooks activated by air bottles. ***Id.*** The Claimant testified there are two, 60-pound air bottles that activate 24 hooks on each spreader and that the air bottles required replacement numerous times during the day. ***Id.*** The Claimant said he had to climb a ladder of about 18 feet to reach the top of the spreaders so the air bottles could be replaced, and he passed the old bottles down as other workers gave him new bottles, with the process being repeated over and over. (Tr. 40.) The Claimant began working as a gear man in 1983 or 1984. ***Id.*** Before becoming a "gear man," the Claimant worked as a slinger. ***Id.***

Claimant's testified that the injury to his right knee occurred on April 25, 1995, when he slipped on the floor in the mechanic shop/supply room. (Tr. 40, 41.) The Claimant said that oil was stored in the mechanic shop/supply room, and oil spilled on the floor as the mechanics retrieved oil for trucks. (Tr. 41.) [5]

Claimant testified that he continued to work after the 1995 injury to his right knee[6] and did not seek medical treatment until three or four days later, when he visited his treating physician, Dr. Thomas Platt. (Tr. 42). The Claimant continued to work without losing time for his knee injury until November 19, 1996, when his knee collapsed as he was attempting to extend a spreader. (Tr. 43.) At that time, the Claimant sought treatment from Dr. Thomas Whitten, an orthopaedic surgeon. (Tr. 44.) Thereafter, the Claimant underwent arthroscopic surgery on his right knee and he remained under Dr. Whitten's care after the surgery. (Tr. 45).

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[5] On cross examination, Claimant admitted that he wrote on the claim form, dated November 11, 1996, that he injured his knee by tripping over bailing wire. (Tr. 111; EX1 at 5). On redirect, the Claimant explained that he had confused details of the 1995 accident to his right knee with the details of a work-related injury to his left knee. (Tr. 127.)

[6] Claimant did not report the accident to his Employer until August 25, 1995, according to the Employer's First Report of Injury or Occupational Illness form signed by the Employer's General Manager on that date. EX 1 at 6.

Claimant testified that he attempted to return to work in June1997, but that he was only able to work for 2 ½ days, even though the Employer hired an assistant to help the Claimant do his job. (Tr. at 46.) The Claimant said he was unable to continue working because his leg became swollen and the pain was too great. ***Id.*** Because Dr. Whitten was on vacation, Claimant visited Dr. House, who drained fluid from the Claimant's knee. (Tr. 47). When Dr. Whitten returned from vacation, he resumed treatment of the Claimant's knee injury. (Tr. 48- 49.)

Claimant testified that the Employer sent him to see Dr. Edward Cohen for his knee injury once before and once after his surgery. (Tr. 60-62.) Claimant said that his visits with Dr. Cohen were very brief, lasting a maximum of five minutes. (Tr. 61.)

The Claimant has not returned to work at Tartan Terminals since his right leg became swollen in June 1997. (Tr. 46, 49.) Claimant testified that he has been unable to return to work because his leg "is worse now than when [he] tried to go back to working three days" in June 1997 and that "it swells up on a continuous basis", with the swelling occurring daily unless he "stays off it." (Tr. 49, 54.) According to the Claimant, the swelling in his knee is so great that he has difficulty with walking a block or even 100 feet at times, that his right leg collapses on some occasions, and that he uses a cane to walk about 50 percent of the time.[7] (Tr. 49-50). In addition to the swelling that affects his walking, the Claimant stated that he suffers from osteoarthritis in his right knee and that Dr. Platt, who has prescribed arthritis medication, began treating him for the disease after his knee injury in April 1995. (Tr. 128-130).

In addition to impeding the use of his right leg, the Claimant claims that his knee injury has exacerbated a back impairment. (Tr. at 53.) Claimant injured his back during an automobile accident in 1992. (Tr. 51.) Although he did not specify the year, he also said he injured his back at Tartan Terminals prior to the auto accident. ***Id.*** However, he said his back impairment did not cause him to lose any time from work before his right knee was injured. (Tr. 51, 52.) Claimant testified that the injury to his right knee has affected the way he walks, causing pain in his back, and that since he injured his knee, the pain in his back is continuous. (Tr. 52-53.) The Claimant testified that he was in pain at the time of the hearing, that he was "in pain constantly", and that sometimes he would not get out of the bed due to the pain. ***Id.***

Dr. Chhabi Bhushan, a neurological surgeon, has been providing most of the treatment for the Claimant's back impairment. The Claimant went to see Dr. Bhushan "five or six times" after the Claimant had been injured in the automobile accident in 1992. (Tr. 51, 52.) The Claimant also visited Dr. Bhushan "quite a few times" for his back impairment after the Claimant injured his knee. (Tr. 52.) The Claimant testified that Dr. Bhushan

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[7] Claimant used his cane at the time of the hearing.

recommended surgery for a ruptured disc, both before and after the Claimant injured his knee, but that he did not follow Dr. Bhushan's advice. (Tr. 53, 114, 115.) Claimant testified that he was afraid that the back surgery would make him worse because of reports he heard about others who had undergone unsuccessful back surgeries. (Tr. 53, 54.) He said his last visit with Dr. Bhushan occurred more than a year before the October 4, 1999 hearing. (Tr. 123.) The Claimant testified that he visited Dr. Slaughter, who recommended against the back surgery suggested by Dr. Bhushan. (Tr. 54.) Although he consulted with them, Drs. Cohen and Whitten did not treat the Claimant's back injury or provide advice concerning it. (Tr. 61, 62, 122, 123.) Claimant admitted on cross examination to having consulted with a Dr. Young concerning his back condition but did not recall seeing a Dr. Mark Reischer. (Tr. 116).

The Claimant also has had other numerous health problems and work-related injuries that are not the subject of his current claim for workers' compensation benefits, and he admitted that he has reported 33 incidents of work-related injuries to his employers and that he has filed from two to seven claims with the Department of Labor. (Tr. 59, 60, 115.) Claimant testified that one of these injuries, which occurred several years before the knee injury in 1995, was a "scar" to his right knee, for which he received a 1 percent disability settlement. (Tr. 41-42). Claimant testified that other work-related injuries included a broken toe and an injury to his left knee. (Tr. 60, 127.)

In addition to being injured on the job, the Claimant has also suffered from hepatitis C, which he first contracted in 1991 or 1992. (Tr. 55-56.) Claimant testified that he did not miss a day from work because of the disease and he disputed a statement by Dr. Platt to the effect that he had missed a year from work because of hepatitis. (Tr. 107- 108.) Claimant said he has not taken medication for the disease for five years, but he indicated that when the disease is active, it makes him weak and causes him to have flu-like symptoms. (Tr. 55.)

Claimant testified that because of his knee and back impairments, his daily activities are extremely limited, and that about the only physical activity he engages in is taking his dog for a walk or taking a drive when he feels well. (Tr. 64). Claimant said his only work consists of monthly meetings of the Baltimore City Election Committee, for which he receives $100 per meeting as an alternate, non-voting member. (Tr. 67-71,124,125.) Prior to 1995, he was a voting member of the Committee, and his tax return for that year indicated that he received more than $3,802 for his committee work. ***Id.***

After referring to his pension statement, the Claimant discussed the number of hours he worked from the year he injured his right knee until the year he stopped working at Tartan. (Tr. 106, CX 4.) He said he worked 2,821 hours in 1995; 2,874 hours in 1996; and 1,418 hours in 1997 (based upon years beginning on October 1 and ending on September 30.) ***Id.***

Claimant described his unsuccessful attempts to find a job he could perform despite his injuries. (Tr. 73-106.) The Claimant testified that he attempted to find a job by calling or visiting employers listed on a job market survey produced by First Rehabilitation Resources, Inc., on behalf of the Insurer/Employer, from September 22 to September 30, 1999. (Tr. 73, 90, 91.) He testified that his efforts did not begin earlier because he had pneumonia and his back and right-knee injuries continued to plague him, and he said he was still suffering from pneumonia at the hearing. (Tr. 91.)
On cross-examination, the Claimant conceded that he did not look for another job from the time he first left Tartan in November 1997 until September 22, 1999, when he began contacting the employers listed on the job market survey, and that he had not looked for a job since he attempted to obtain the jobs listed on the survey. (Tr. 119.) Despite the fact that his job search lasted only about a week, the Claimant said he made a good faith and a conscientious effort to obtain employment and that he has a strong desire to work. (Tr. 65, 74, 106.) Despite his desire to work, the Claimant said his attempts to find a job through the job market survey were unsuccessful because (1) some jobs required lifting heavy objects or constant sitting, standing and/or climbing - tasks he said he cannot perform because of his injuries, (2) some jobs, which had been advertised in 1997 and 1998, had already been filled, (3) some employers had no job vacancies, (4) some jobs required education or training which he does not have, and (5) some employers never contacted him after he completed a job application or left phone messages. (Tr. 73-106.) The Claimant said he did not believe he could perform a light, sedentary job, such as a job sitting at a desk, because of his injuries. (Tr. 62, 65.)

The Claimant testified that the Insurer mailed him 22 checks, totaling $48,935.07, in 1998, but that he returned the checks without endorsing or cashing them at the advice of his then attorney, Mr. Maggio. (Tr. 56-58, 119-121.) The Claimant said Beth Straw, a representative of the Insurer, told him to return the checks, some of which had expired, to the Insurer and that the company would issue a new check; however, it never did, even though he called her numerous times to inquire about the money. (Tr. 56-57.) The Claimant said eventually another representative named Mr. Metacheski or Metacheck told the Claimant that the Insurer would not send him another check until his case was settled. (Tr. 58.)

The Claimant testified that he has received more than $1,300 in disability benefits per month from the Social Security Administration since approximately August 1998. (Tr. 64, 117.) Before awarding the benefits to the Claimant, the Claimant said the agency sent him to Dr. Cyrus Pezeshki for an evaluation. (Tr. 63; CX 9.) In addition to receiving disability benefits from the Social Security Administration, the Claimant also receives a retirement pension of $2,300 monthly, which he applied for in November 1998. (Tr. 62, 116-117.) Claimant said he was eligible for disability benefits under his union's retirement system, but that he applied for "regular" retirement benefits because he would incur less taxes and because his wife would get more money if he died. (Tr. 62, 63.)

Testimony of Mr. Douglas Wagner, Union President

Douglas Wagner, president of Cargo Local 333 for the Port of Baltimore as well as a trustee of the Pension, Welfare, Severance, Annuity, and Scholarship Funds for the union, testified that the Claimant has been a member of the union since 1962. (Tr. 29, 30, 31, 106; EX 4.) Mr. Wagner said the Claimant was a "gear man" before he obtained a retirement pension on November 1, 1998, and he testified primarily about the duties of that job and how Claimant's injuries could affect his ability to perform those duties. (Tr. 31-32). Mr. Wagner testified that a "gear man" supplies, retrieves, maintains and then returns equipment after use; that the equipment consists of such items as shackles, chains, bars and hooks; that while the weight of the equipment varies, most of it is heavy; and that, for example, one chain of steel could be 20 feet long with big links and could weigh 90 pounds or more. (Tr. 31-32.) Considering the demands of the job, Mr. Wagner testified that a person with a permanent partial disability of 20 to 25 percent to a knee could not perform successfully in the position of a "gear man" and he further testified that it would be difficult for such an employee to be reassigned to a light-duty position, absent a high level of seniority. (Tr. 33-34.) In light of the difficulty with obtaining sedentary positions for disabled workers, the union's provisions allow employees to retire if they can no longer perform all longshore duties. (Tr. 33-34.)

Surveillance Tapes of the Claimant
And Testimony by Private Investigators

The Employer/Insurer submitted three VHS videotapes produced by two private investigators who captured footage of the Claimant as he conducted activities outside his home. (Tr. 130-154; EX 20a, 20b, 20c.) The private investigators, who worked for Maryland Claims Investigations when the videotapes were produced, were Mr. Bill Dewan and Mr. Richard Michael Dyer. (Tr. 134, 146.)

Mr. Dewan testified that he was licensed by the Maryland State Police and that he had been conducting surveillance activities for 5 ½ years. (Tr. 134.) He submitted and described the first videotape, which lasted 2 minutes and 13 seconds. (EX 20a). That videotape contained footage of the Claimant in the driveway of his home on May 19, 1997 performing various activities: bending over a car, appearing to place something inside, and closing the car door; walking with a limp (but no cane) over to an apparently empty garbage can, which he picked up; pushing or pulling some apparatus that opened the garage door, placing the garbage can and its lid inside the garage, and then closing the garage door; and finally getting into a car (which Mr. Dewan said was the Claimant's wife's Mercedes) and driving away. (Tr. 140-142, EX 20a.)

Mr. Richard Michael Dyer, who had been licensed by the Maryland State Police as a private investigator for about 7 years, produced the other two videotapes submitted by the Employer/Insurer. (Tr. at 146 to 151.) Mr. Dyer testified that he conducted surveillance

of the Claimant for five days but only produced film on two of those days because he did not see the Claimant on the other three days. ***Id.***

The first videotape that Mr. Dyer submitted, which lasted 8 minutes and 25 seconds, was produced on August 6, 1997. (Tr. at 147, EX20b.) The first segment was taken at the parking lot of Dr. Edward R. Cohen's office, where the Claimant went for a medical appointment, and showed the Claimant smoking, walking with a cane and a limp, getting into and out of his car, bending over his car, locking its trunk and driving the car. (Tr. 148, 149; EX20b.) About one hour later, the videotape showed the Claimant as he walked in a bank's parking lot, and although he limped as he walked, he was not using the cane he had used at the doctor's office. (Tr. at 149, 150; EX20b.) The videotape then showed the Claimant and his wife about two hours later as they visited some people at a residence, first driving up to the residence with his wife and then playing with an infant boy. During the play session, the Claimant bent over as he bounced a beach ball, threw it and put it on his head, and then bent over a wagon with the infant in it. The Claimant then patted a dog, picked it up, put it into the wagon and attempted unsuccessfully to pull the dog in the wagon, because the dog got out of the wagon. Finally, the videotape showed the Claimant as he walked out of the house to the yard, smoked a cigarette, engaged in conversation, and bent over. He then walked with a limp (but no cane) as he went to his car and drove off with his wife. ***Id.*** During the hearing, the attorneys for the Claimant and Employer and the investigators debated as to whether the Claimant was holding his back because of pain, tucking in his shirt, or pulling up his pants as he walked to the car before driving off. (Tr. 150-151.)

The final tape, which was only 30 seconds long, was taken on September 16, 1997 by Mr. Dyer, apparently at the Claimant's residence. (Tr. 151, EX20c.) The videotape, which begins at 11:55 a.m., showed the Claimant as he bent down at the front tire on the passenger side of a car and then he walked to the front of the car, which he got in. EX20c. He appeared to be performing a task while he was bending down at the tire, but one can not tell what he was doing because the view is obstructed. ***Id.***

MEDICAL RECORDS AND DEPOSITION TESTIMONY

Dr. J. Jay Platt

Dr. J. Jay Platt, who specializes in general practice and family medicine, was deposed at his office on September 23, 1999, and the deposition transcript as well as his curriculum vitae and certain medical records relating to the Claimant were admitted into evidence.[8] (EX 5; CX 8). During Dr. Platt's deposition, he stated he had been treating the Claimant since September 1991. EX 5 at 5. Dr. Platt was treating the Claimant for

[8] The Claimant testified during the hearing that Dr. Platt is his family physician. (Tr. 42.)

pneumonia and arthritis primarily in his right knee at the time of the hearing. ***Id.*** at 27. After the Claimant had a car accident in December 1992, Dr. Platt treated him for pain in the back of his neck, in his left index finger and the radial aspect of the left hand. ***Id.*** at 10, 11. Dr. Platt conducted X-rays of the patient and prescribed nine sessions of physical therapy.[9] (EX 2 at 8). Subsequently, Dr. Platt referred the Claimant to Dr. Bhushan, who diagnosed the Claimant as having a herniated disk in his back. (EX 5 at 10, 11.) In addition to treating the Claimant for the injuries he suffered in the car accident, Dr. Platt was also the first physician who treated the Claimant after he injured his right knee at work on April 25, 1995, and Claimant's first visit with Dr. Platt for his knee injury was on April 29, 1995. ***Id.*** Dr. Platt testified that the Claimant said he slipped on an oily concrete floor at work and twisted his knee, causing the knee to become painful and enlarged, and limiting motion on the day of the accident. ***Id.*** During the medical appointment with Dr. Platt, the Claimant also had difficulty flexing his knee. ***Id.*** X-rays conducted for Dr. Kate Tobin on April 29, 1995, showed the Claimant had mild, degenerative joint disease in his knee (CX 5(h).) An MRI conducted on August 18, 1995, revealed a tear of the medial meniscus, moderate joint effusion, a small popliteal cyst, and degenerative changes. (CX 5(i)). In January 1996, Dr. Platt referred the Claimant to an orthopaedic specialist, Dr. Whitten. (EX 5 at 14.)

Dr. Platt discussed slips that he wrote to excuse the Claimant from work because of various illnesses. (EX 5 at 6, 7, 17). Dr. Platt wrote a note on August 1, 1997, that the Claimant visited the doctor's office on May 23, 1997, and was unable to return to work because the painful enlargement of his right knee. (EX 5). On December 17, 1997 Dr. Platt certified that the Claimant could not work because of multiple health problems and he explained that the Claimant's disabling health problems included hypertrophic degenerative arthritis, sciatic pain as a result of lumbar disk syndrome, chronic fatigue due to hepatitis C and shortness of breath caused by Chronic Obstructive Pulmonary Disease. (EX 5 at 6, 7, 9.) Dr. Platt said the arthritis was primarily in the Claimant's right knee, but the disease is present in other joints. ***Id.***

Although Dr. Platt opined that all of the Claimant's health conditions combine to make him disabled, Dr. Platt testified that the Claimant cannot work as a longshore worker primarily because of his right knee and that the knee injury would prevent the Claimant from working even if he did not have the other health problems. (EX 5 at 14-15, 24-26).

Dr. David Eisner

Dr. David Eisner wrote in a report of November 11, 1996, that an X-ray conducted on November 7, 1996, revealed that the Claimant's knee had a medial, tibiofemoral

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[9] The records of the Claimant's physical therapy sessions that were prescribed by Dr. Platt are included at EX15, pages 172 to 179.

osteophyte formation; patellofemoral osteophytes; and a small, bony radiodensity projecting off the distal femur in its central portion. CX 5(a). Dr. Eisner also wrote that the osteoarthritis in the Claimant's knee appeared to be progressing. ***Id.***

Dr. Thomas V. Whitten

Dr. Thomas Whitten, an orthopedic surgeon, was the doctor who provided the majority of the treatment for the Claimant's right knee after the accident of April 1995. (CX 2 (a) to (l), EX 3). Dr. Whitten's deposition was taken on September 16, 1999. (EX3.) The Claimant visited Dr. Whitten's office on November 13 and 20, 1996; and on January 27, February 14, March 7, April 4, May 9, June 13, July 14, August 11 and 27, September 8, and on December 15, 1997. (CX2(a) to (l), and EX3 at 15 to 31.) The Claimant first visited Dr. Whitten on November 13, 1996, 1 ½ years after he injured his right knee at work. CX2(l) and EX3. The Claimant told Dr. Whitten that he was experiencing progressively increasing pain and swelling in his right knee - conditions that made it difficult for him to walk. After reviewing an MRI and an X-ray, Dr. Whitten diagnosed the Claimant as having a significant tear of the medial meniscus and early arthritic changes under the patellofemoral joint. EX 3 at 6 to 8. Dr. Whitten recommended that the Claimant undergo surgery and that he refrain from working. (EX 3 at 9, 13.) During the operation of January 16, 1997, Dr. Whitten also discovered there were loose fragments of cartilage that were hanging off the surface of the femur, patella and tibia, all of which were becoming arthritic. CX3 and EX3 at 28, 29. After undergoing surgery, the Claimant had some periods of improvement, but he continued to suffer from a variety of symptoms, such as pain, swelling, arthritis, a limp, crepitus (grinding of the knee joint), and a slight contracture that prevented him from fully extending his knee. (EX 3 at 11 to 43.) Dr. Whitten's treatment of the Claimant included draining fluid from his knee, prescribing physical therapy[10], the use of ice, pain medication and anti-inflammatory drugs. ***Id.*** After the Claimant's swelling had gone down during the previous four weeks, Dr. Whitten concluded that the Claimant could return to work at the visit of May 9, 1997, but cautioned him against excessive climbing, squatting and kneeling. (EX 3 at 17, 18.) Dr. Whitten released the Claimant to return to work as of May 19, 1997. (EX 3 at 17).

Although the exact date is unclear[11], the Claimant returned to work in May or June but only remained for 2 ½ days because of swelling and pain. (Tr. at 46.) He received treatment from Dr. Homer House on May 27, 1997, because Dr. Whitten was out of town. (EX 3 at 20.) Dr. House drained the claimant's knee and injected the Claimant's knee with

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[10] The records of the Claimant's physical therapy sessions that were prescribed by Dr. Whitten appear at EX15, pages 149 to 171.

[11] Claimant testified that he returned to work in June 1997, but it appears that he actually returned to work in late May 1997.

Xylocaine, Carbocaine and Celestone. (CX 2 and EX 3 at 22.)

The Claimant's next visit with Dr. Whitten was on June 13, at which time Dr. Whitten stated the condition of the Claimant's knee was worsening. (EX 3 at 17.) After prescribing a pain medication and other ameliorative measures, Dr. Whitten said that the Claimant especially should avoid activities that involved climbing. ***Id.*** Dr. Whitten wrote a note stating that the Claimant could return to work on June 23, 1997, and that he could perform "regular" work (although in the office notes he recommended that the Claimant avoid climbing steps at work). (CX 2(f), EX 3 at 18, 20-21.)[12]

During the Claimant's visit of July 14, 1997, Dr. Whitten diagnosed the Claimant as having a slight contracture of the knee due to arthritis, which prevented him from being able to fully extend his knee. EX 3 at 18. It was also during this visit that the Claimant first told Dr. Whitten that a pre-existing back condition was causing pain. EX 3 at 19, CX2(f). Dr. Whitten indicated that an MRI had shown that the Claimant had a ruptured disk in his back and opined that "without doubt" the Claimant's limp was aggravating his back condition. EX 3 at 43. Dr. Whitten referred the Claimant to Dr. Bhushan, who had previously treated Claimant for his back condition. EX 3 at 20.

The Claimant continued to suffer from and complain of the same symptoms at varying degrees during visits between July 14, 1997, and December 15, 1997, the last recorded appointment. (EX 3). Dr. Whitten found maximum medical improvement on August 11, 1997. (EX 3 at 22 to 23). During the Claimant's visit of October 8, 1997, Dr. Whitten formulated a disability rating for the Claimant's right knee, and he concluded that the Claimant's knee had a permanent disability of about 30 percent, with pre-existing problems from arthritic changes constituting about 10 percent of the total disability rating.[13] (EX 3 at 26, 27, 34, 35.) During the record for that same visit, Dr. Whitten stated that it would be difficult for the Claimant to perform any job that requires long periods of standing or walking and that he could not lift more than 10 to 15 pounds on a regular basis. (CX2(j) and EX3 at 16.) At the time of Claimant's his last visit with Dr. Whitten on December 15, 1997, Dr. Whitten stated that the Claimant's knee appeared to have "settled down," that he saw no swelling and that the Claimant had only a slight limp. EX 3 at 15. Although the Claimant still had generalized osteoarthritic changes in the medial femur and patellofemoral joint, as well as pain and limitation of motion, Dr. Whitten said the Claimant's symptoms were not severe enough to warrant further surgery. EX3 at 15.

Despite the Claimant's progress, Dr. Whitten said the Claimant's decision not to

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[12] The Claimant testified that he never returned to work. (Tr. 46, 49.)

[13] The disability rating that Dr. Whitten offered in October 1997 was 5 percent higher than a disability rating he submitted to the Insurer on August 6, 1997. EX 3 at 35, 36; CX2(h); EX18, 19.

return to his longshore job and to attempt to find a less active job was a wise approach and he opined that the Claimant's inability to perform his former job was caused by both his back and knee problems. (EX 3 at 32, 33.) However, he said the Claimant's knee condition, alone, was enough to prevent the Claimant from returning to his previous line of work. (EX 3 at 32.) But despite the Claimant's physical limitations, Dr. Whitten opined that the Claimant could perform sedentary work, which involved limited walking and climbing stairs. (EX 3 at 38.)

Dr. Edward Ralph Cohen

Dr. Cohen is a board certified orthopaedic surgeon who examined the Claimant on behalf of the Employer on three occasions (November 27, 1996, April 16, and August 6, 1997) in order to assess the Claimant's condition resulting from his April 1995 work injury. Dr. Cohen was deposed on September 26, 1999. (EX 2).

During the Claimant's first visit, which was November 27, 1996, it was noted that the Claimant's knee had degenerative arthritic changes, a bowlegged deformity, spurs, fluid, pain, and a mild restriction in motion, but there was no evidence of torn cartilage or instability during the examination. Based on his examination and review of reports, Dr. Cohen diagnosed the Claimant with having a degenerative tear of his right, medial meniscus superimposed over arthritis and he recommended that the Claimant undergo arthroscopic surgery. (EX 2 at 9-11.)

The Claimant's next visit with Dr. Cohen occurred on April 16, 1997, after the Claimant had undergone arthroscopic surgery performed by Dr. Whitten. (EX 2 at 11.) After reviewing Dr. Whitten's operative report, Dr. Cohen opined that as described the arthritis was so widespread that it could not have been caused by one single incident. (EX 2 at 13, 14.) Dr. Cohen said he did not know whether the Claimant's accident aggravated the Claimant's pre-existing arthritis or whether it was just a flare up, as the Claimant did not have "immediate and significant symptoms" of arthritis after the accident. (EX 2 at 23-25.) Although Dr. Cohen said he did not know whether the Claimant had injured his knee prior to the accident of April 1995, he said he doubted the Claimant's statement that he had never experienced problems with his right knee before the accident,[14] in view of Claimant's bowlegged deformity and the degree of the arthritis. (EX 2 at 27.) Dr. Cohen said he believed the Claimant did not need a cane or any other kind of external support, he noted that the Claimant's recovery was progressing too slowly because patients usually recover from a partial arthroscopic meniscectomy within four to six weeks, and he concluded that the Claimant could work with restrictions as of the April 16, 1997 visit,

[14] After his attorney reminded him of the injury, the Claimant testified during the hearing that he received a 1 percent disability settlement for a scar to his right knee prior to the April 1995 accident. (Tr. 41.)

provided that he not climb ladders or stand continuously without taking breaks. (EX 2 at 14, 22, and 23.) Dr. Cohen attributed the work restrictions solely to the Claimant's arthritis that predated the accident. (EX 2 at 15.)

Claimant's final visit with Dr. Cohen was on August 6, 1997, at which time the Claimant still complained that his knee swelled, that he could not walk very far, and that he still needed a cane to walk. (EX 2 at 15.) Dr. Cohen's examination findings were essentially unchanged from the last visit but he removed the work restrictions because sufficient time had lapsed since the operation and because the Claimant had no inflammation. (EX 2 at 28-29.) Dr. Cohen admitted that he removed the Claimant's work restrictions even though he did not know the duties of a longshore worker, apart from a "general concept" of what the job entailed, and specifically that it involved hard, rigorous work. ***Id.*** Dr. Cohen specifically stated that he believed the Claimant could climb ladders. ***Id.*** At that time, Dr. Cohen estimated that the Claimant's right knee had a permanent partial disability rating of 25 percent, with at least half of the rating arising from pre-existing arthritis and 10 to 12 percent of the disability rating due to the accident of April 1995. (EX 2 at 17-18). While formulating the Claimant's disability rating, Dr. Cohen said he consulted the Guides to Evaluation of Permanent Impairment published by the American Medical Association. ***Id.***

With regard to the Claimant's back injury, Dr. Cohen said the Claimant did not complain about that injury and that Dr. Cohen did not examine the Claimant's back. (EX 2 at 18.)[15]

Dr. Chhabi Bhushan

Dr. Chhabi Bhushan is a board-certified neurological surgeon who began treating the Claimant in 1993, two years before his work-related accident, for back injuries; Claimant was also treated by his associate, Dr. Neal Aronson. (CX 6(e); EX 4, EX 7, EX 16). The transcript of Dr. Bhusan's deposition of September 16, 1999, a copy of his curriculum vitae, and his medical reports of January 25, January 29, and February 11, 1993; November 11, and November 22, 1996; and November 10, and December 8, 1997; and April 23, 1999 are of record. (EX 4; CX6(a) to CX6(e).)

Dr. Bhushan first treated the Claimant on January 25, 1993, after receiving a referral from Dr. Platt, the Claimant's family physician. EX 4 at 6, 7. At that time, the Claimant revealed that he had experienced neck pain and left index finger numbness, and later low back pain, following a December 1, 1992 automobile accident, and that within a few days he had pain radiating into both hips and the front of his thighs down to both

[15] In contrast, Claimant testified that he attempted to tell Dr. Cohen about his back problems, but Dr. Cohen would not listen. (Tr. at 61, 62.)

knees. (EX 4 at 7-8). The Claimant had returned on a light-duty basis about two days after the accident and he was still working on a light-duty basis when he visited Dr. Bhushan a year later. ***Id.*** At the time of the initial visit, he complained that the pain that radiated from his lower back to the front of his thighs was getting progressively worse. Based on the Claimant's history, physical examination, and medical records, Dr. Bhushan diagnosed the Claimant as having irritation of the nerve root at the L-3 level of his back and he recommended further testing, which led to additional X-rays, a CT scan and a myelography.[16] (EX 4 at 12 to 15.)

The Claimant visited Dr. Bhushan's office again on February 11, 1993, at which time he discussed the results of diagnostic tests with the Claimant. Dr. Bhushan stated the X-rays revealed marginal osteophytes at the L2-L3 level and a mild curvature at the tracheal lumbar region with convexity to the right; that the myelography revealed a slight bulge between L3-L4 and L4-L5 and, perhaps, also between L2-L3; and that the CT scan following the myelography revealed a central disk bulge between L4-L5, along with a central bulge at the other levels but to a lesser extent between L2-L3 and L3-L4 (of a degree to be expected for someone of Claimant's age.) (EX 4 at 14-15). Dr. Bhushan told the Claimant his back condition could be treated with an intensified program of exercises or with surgery. (EX 4 at 15 to 16.)

Claimant reported similar symptoms during visits of August 2, 1993, and June 6, 1994. (EX 4 at 17, 18.) Another MRI of the patient's back was conducted., which revealed a far-out, lateral, herniated disk between L3-L4, all the way to the side, on the left side between L3 and L4, as well as a mild bulging or protrusion of the disk between L4-L5 and also at L5-S1. ***Id.***

More than two years passed before the Claimant visited Dr. Bhushan again on November 11, 1996,[17] and, while the Claimant had injured his right knee at work since the time of his previous visit, the Claimant did not mention his knee injury to Dr. Bhusan during the November 11, 1996 visit. (EX 4 at 24.) The Claimant complained of low back pain, radiating into both groins and the front of both thighs down to both knees. (EX 4 at 19.) The Claimant, who was still working, said the pain was equally intense on both sides. ***Id.*** The Claimant also told Dr. Bhushan he had seen Dr. Stephen G. Reich, a neurologist, on September 18, 1996 (discussed ***infra***). (EX 4 at 20, 21.) On November 22, 1996, Dr. Bhusan wrote to Dr. Platt about the Claimant's back condition. Bhushan Depo. at 23. In

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[16] Records of all the diagnostic tests that were conducted on January 29, 1993, at Sinai Hospital of Baltimore are included at EX10 at pages 136 to 138. Progress notes for the myelography performed by Dr. Bhushan are included at EX 4 at page 38. The record of the lateral spine CT scan report is included at CX 5(e).

[17] This visit was a mere eight days before Claimant's knee "collapsed" at work, according to his testimony (Tr. 43), discussed above.

that letter, Dr. Bhushan discussed the results of an X-ray taken on November 11, 1996, and of an MRI taken on November 13,1996[18] which showed that the findings were essentially unchanged. (EX 4 at 22-23).

The Claimant's final visit with Dr. Bhushan occurred on November 10, 1997, at which time Claimant told Dr. Bhushan that he was still experiencing low-back pain radiating into both groins and the front of both thighs down to both knees. (EX 4 at 22-27.) Although these symptoms were the same as those the Claimant had reported previously, the Claimant mentioned his right-knee injury for the first time during this visit and he told Dr. Bhushan that he had undergone knee surgery in January 16, 1997, and that his orthopaedic surgeon told him the knee may have to be replaced. ***Id.*** Dr. Bhushan opined that Claimant's pain on the left side and in the lower- back regions was caused by the far-out, lateral, herniated disk on the left side but that the herniated disk would not explain the pain on the right side. ***Id.*** Dr. Bhushan recommended that the Claimant undergo surgery to remove the herniated disk, but he opined that the surgery would only remove the symptoms in the lower-back region and on the left side, but not on the right side. ***Id***. Dr. Bhushan said the Claimant said he would consider the surgery but never contacted Dr. Bhushan again. ***Id.*** Dr. Bhushan concluded that some of the Claimant's back condition was simply consistent with the Claimant's age and work activities but that the car accident in December 1992 also contributed to the Claimant's back injuries. (EX 4 at 29, 34, and 36.) Dr. Bhushan testified that he did not know whether the Claimant's limp caused by his right-knee injury aggravated the Claimant's pre-existing back condition, but he did not rule out the possibility. (EX 4 at 44.) When asked whether immobilization, which had been caused by the Claimant's knee injury, was bad for the recovery of his back condition, Dr. Bhushan responded that immobilization could hamper the improvement of the Claimant's back condition. (EX 4 at 44-48.)

Dr. Bhushan said he never placed any work restrictions on the Claimant, even though the Claimant was suffering from a condition that warranted surgical intervention. ex 4 at 39. When asked why he did not place work restrictions on the Claimant, Dr. Bhushan said the Claimant did not ask him to do so. ***Id.*** However, Dr. Bhushan did write in a note on December 8, 1997, stating that the Claimant could not work because the pain in his back and right knee was too severe, apparently to help the Claimant to obtain disability benefits from Social Security. (EX 4 at 42, 43.) Dr. Bhushan also said during the deposition that the Claimant cannot work as a longshore worker if he still has the symptoms he was experiencing in November 1997. (EX 4 at 47.)

Dr. Emanuel Rechthand

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[18] The record of the MRI taken on November 13, 1996, at Sinai Hospital of Baltimore is included at CX5(d) and at EX10, page 133. The record of the X-ray taken on November 11, 1996, at Sinai Hospital of Baltimore is included at CX5(f) and at EX10, page 134.

Dr. Bhushan referred the Claimant to Dr. Emanuel Rechthand for electrodiagnostic testing. Dr. Emanuel Rechthand's report of the Claimant's visit of December 10, 1996, stated that his tests did not demonstrate electrodiagnostic abnormalities that would assist in the localization of the symptoms in the Claimant's back or lower extremities. (CX 5(g).) Dr. Rechthand said he was aware that the Claimant's left lumbar spine had lateral disk protrusion at the L3-4 level; however, electrodiagnostic tests detected no injury to the L3-4 spinal roots. ***Id.*** Dr. Rechthand said had no explanation to account for the Claimant's pain in his right leg, which he said was greater than the pain in his left leg. ***Id.***

Dr. D. Graham Slaughter

Dr. D. Graham Slaughter, a neurosurgeon, examined the Claimant on August 4, 1999 and provided his opinion concerning the Claimant's right knee and back conditions in correspondence of August 11, 1999. CX1(a), (b). Dr. Slaughter concluded that the Claimant was unable to be employed in any degree of a "labor intense" occupation because of his knee and back injuries and he opined that the Claimant's right-knee injuries have caused him to be unable to perform his duties as a longshore worker. ***Id.*** Dr. Slaughter stated that "[b]ecause of the pain in his knee, especially following the surgery, he had an aggravation of his lumbar spine discomfort that has been of intermittent nature since, precipitating a repeat work up that showed extensive osteoarthritic changes in the lumbar spine associated with what may be a far lateral disc herniation at L3-4 and scoliosis." ***Id.*** He further stated that the right knee pain immediately following Claimant's knee operation produced an aggravation of his chronic lumbar spine discomfort "in view of the fact that he was not able to walk normally aggravating his scoliosis and degenerative disc disease." ***Id.*** Dr. Slaughter opined that the Claimant's knee condition was his disabling condition, in view of the fact that he had been unable to return to work due to knee pain, and he noted that the back condition exacerbated following his retirement while he was recovering from back surgery and pain. ***Id.***

Dr. Stephen G. Reich

Dr. Stephen G. Reich, a neurologist,[19] evaluated the Claimant on September 18, 1996, for back injuries that he suffered in the motor vehicle accident of December 1992. CX7 at 1. Based on his examination and review of medical records, Dr. Reich concluded that the Claimant's back pain was primarily in the lumbar regions with some radiation to the anterior thighs and he opined that interferes with the Claimant's ability to function. CX7 at 5. Dr. Reich stated the neurological examination was normal. ***Id.***
Dr. Reich determined that the chronicity of the Claimant's low-back pain was largely attributable to his immobility, weight gain of 30 pounds, and lack of exercise, and he therefore recommended the Claimant's back condition be treated with weight loss and

[19] Dr. Reich's curriculum vitae is not of record.

gradual mobilization with an exercise program for the lower-back region, along with nonsteroidal, anti-inflammatory drugs, if necessary. CX7 at 6. He did not comment upon the Claimant's ability to work or the significance (or occurrence) of his knee injury. ***Id.***

Dr. Cyrus Pezeshki

Dr. Pezeshki performed a disability consultation about the Claimant's condition on behalf of Maryland Disability Determination Services and prepared an orthopaedic report was produced on May 2, 1998. CX9. After asking the Claimant about his medical history and examining the Claimant, Dr. Pezeshki diagnosed the Claimant as having severe osteoarthritis in his right knee, possible degenerative changes of the lumbosacral spine, and a bilateral heel spur. ***Id.*** Considering the nature of the Claimant's injuries, Dr. Pezeshki concluded that the Claimant has a limited ability to perform activities that require lifting, squatting, and climbing. Dr. Pezeshki noted the Claimant used a cane to maintain his balance because of his right-knee injury. ***Id.***

Dr. Marcel A. Reischer

Claimant was referred to Dr. Marcel A. Reischer, a specialist in rehabilitation medicine and electromyography, by Dr. J. Jay Platt, his family physician. EX 12 at 142. Dr. Reischer evaluated the Claimant on December 4, 1992, for weakness, numbness and pain in the neck, upper extremity and lower back after the Claimant had been injured in an automobile accident a few days earlier. ***Id***. Although Dr. Reischer was treating the patient for injuries he suffered in the automobile accident, Dr. Reischer noted that the Claimant had also injured his lower back and right elbow during a work-related accident that occurred about a year earlier. ***Id.*** Based on the patient's history and Dr. Reischer's examination, Dr. Reischer concluded there was evidence that the Claimant had multiple soft tissue injuries, and he was concerned about the numbness in the Claimant's left index finger because the numbness suggested the possibility of radicular involvement and/or peripheral nerve injury. ***Id.*** Dr. Reischer prescribed physical therapy of an consisting of modalities, massage and motion exercises and he recommended that the Claimant refrain from working until his physical therapy was completed. EX12 at 143.

Dr. Henry A. Young

Dr. Young, a neurosurgeon, conducted a neurological evaluation on December 18, 1992, to treat the Claimant for low back pain he suffered as a result of the December 1, 1992 automobile accident. EX13 at 145. The Claimant reported some neck and shoulder pain after the accident which had improved, but he indicated that the low-back pain had worsened, radiating intermittently toward his calves and buttocks, with movement of the back, prolonged sitting or standing exacerbating the pain. ***Id.*** Dr. Young concluded that the Claimant had post-traumatic cervical and lumbar strain and recommended further testing (including MRI scanning or a myelography) to determine if the Claimant had a herniated lumbar disk. EX13 at 147.

The Claimant also saw Dr. Young on January 18, 1993, at which time he complained of pain radiating to his knees and toward the groin.. EX13 at 144. While MRI scanning showed some disc pathology at L1 though L4 (***see*** EX17 at 194), Dr. Young was not sure how significant the disk pathology was and he again recommended myelography. ***Id.***

Dr. William E. Beatie

Dr. William E. Beatie, an orthopedist, concluded that the Claimant had "two work-related injuries," the first occurring one year before when he fell at work, injuring his right knee, and a second occurring on January 4, 1996, " when he fell again at work injuring his left knee and both wrists." Dr. Beatie's January 18, 1996 report diagnosed the Claimant with a medial meniscal tear in the right knee, bilateral wrist sprains (resolving) and [rule out] medial meniscal tear of the left knee. (EX 7 at 103-04).

MISCELLANEOUS

Labor Market Survey

First Rehabilitation Resources Services submitted a labor market survey, dated August 27, 1999, on behalf of the Employer/Insurer. EX6 at 47 to 57. Samantha Kieley, a senior rehabilitation case manager, wrote the report on the labor market survey. EX6 at 57. The survey listed 70 employers offering positions as parking lot attendants, security guards, assemblers/ packers and inventory control clerks, and counter representatives selling auto parts in Baltimore and surrounding areas. EX 6 at 47 to 57. The salary for the positions ranged from minimum wage to $9 per hour. EX 6 at 47. First Rehabilitation selected the positions in the survey based on the Employer's/Insurer's request that the report target jobs that do not require extensive walking or climbing consistent with the recommendations of Drs. Thomas V. Whitten and Edward R. Cohen. ***Id.*** The job location service also selected positions for the Claimant based on the assumption that he had a high school diploma.[20] First Rehabilitation considered the jobs it selected to be consistent with the Claimant's physical capabilities and work history as a longshore worker, considering that such positions are generally light- to medium-duty or that the positions allow for modifications. EX6 at 47, 48. The labor market survey was compiled by utilizing the Baltimore Sun newspaper; the Baltimore area yellow pages; Combined Volumes I and II of the Dictionary of Occupational Titles (DOT), 4th Edition Revised; and the Occupational Outlook Handbook (OOH), January 1998-99 edition, a resource developed by the United States Department of Labor, Bureau of Labor Statistics. EX6 at 48. The job-locator service called the employers to determine the existence, salaries, and qualifications of the positions. ***Id.*** Finally, the job locator service attempted to use information obtained from the Claimant to conduct the survey, but the interview never occurred. EX6 at 47.

Records Relating to Previous Claims

A U.S. Department of Labor Compensation Order stated the Claimant was working for Maher Terminals, Inc, of Baltimore, as a gearman when he injured his right foot on November 17, 1982. EX18 at 208. The Compensation Order stated that the Claimant sustained a permanent, partial disability rating of 1 percent to his right foot as a result of the accident. EX18 at 209. Maher, which was self-insured, paid the Claimant $1,075.64 on August 25, 1983, as compensation for the work-related injury. EX18 at 209, 210. At the

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[20] First Rehabilitation Resources Inc.'s assumption that the Claimant had a high school education or its equivalent appears to have been incorrect. Tr. 103, 105. The Claimant said during the hearing that his formal education ended before he completed the seventh grade. Tr. at 47. He testified that he never obtained a high school diploma. Tr. at 103, 105. He earned credit for some additional grades by taking an equivalency exam in the 1960s, but he was uncertain how many credits he earned. Tr. at 47, 48.

time of the accident, the Claimant had an average weekly wage of $869.17. EX18 at 209. The Claimant's disability rating of 1 percent entitled the Claimant to 2.05 weeks of compensation at the rate of $524.70 per week. ***Id.***

The Employer/Insurer also submitted copies of the Employer's First Report of Injury or Occupational Illness forms that were related to accidents in January 14, and 20, 1970, January 1973, July 1974, March 1978, and in April and March 1984; Marine Index Bureau, Inc. report summaries of 11 injuries occurring from April 1968 to April 1995; and Notices of Final Payment or Suspension of Compensation Payments dated February 20, and 28, 1985. EX 7 at 74 to 86.

An Injury Index completed on behalf of the Steamship Trade Association on December 22, 1978, indicated that the injury on March 14, 1978, was the claimant's 33rd claim. EX7 at 80.

Section 8(f) Petition

The Employer/Insurer filed a petition that requested relief under Section 8(f) of the Act on April 26, 1999, because the Claimant had several injuries that predated the 1995 accident to his right knee. EX7 at 64 to 73. The District Director stated in a letter, dated May 17, 1999, that the Employer's/Insurer's petition for Section 8(f) relief under the Act was denied because the parties had not agreed on the nature and extent of permanent disability to the Claimant. EX7 at 63. In addition to attaching the December 22, 1978 Injury Index (discussed above) to the petition, the Employer/Insurer submitted medical records about the health conditions the Claimant had prior to sustaining the right-knee injury (also discussed above). EX7 at 80 to 125.

The Employer's/Insurer's petition for Section 8(f) relief and supporting documents stated that the Claimant had the following medical conditions that predated his right-knee injury in 1995: (1) injuries to his right knee and left elbow on December 31, 1969; when he fell on dunnage while employed with Chesapeake Operating Company; (2) injuries to his right knee and leg on January 19, 1970; when he fell into breakage between drafts of lumbar while employed with Jarka Corporation; (3) injuries to his right leg and ankle on January 3, 1973, when he stepped in a hole while employed with Nacirema Operating Company; (4) injuries to his left elbow and right knee on July 3, 1974, when Claimant allegedly was struck by an empty barrel causing while employed with John T. Clark and Son of MD; (5) injury to his right foot and right knee on March 14, 1978, when a forklift blade fell on the Claimant's while employed with John T. Clark and Son of MD; (6) injury to his left foot, on April 12, 1984, when the Claimant alleges a shackle struck while employed with Maher Terminals, leading to an award of permanent partial disability in the amount of 10 percent for the left, 5th toe;
(7) twisting injury to the right knee on March 27, 1984, while employed with Maher Terminals, leading to an award of a 1 percent permanent partial disability to his right leg

(knee); and (8) neck, back and nerve injuries resulting from the automobile accident of December 15, 1992, discussed above. (EX 7, 8).

DISCUSSION

Establishment of Compensable Injury

According to the Act, an injury is defined as an "accidental injury or death arising out of and in the course of employment." 33 U.S.C. § 902(2). Here, the parties stipulated that the Claimant sustained an injury to his right lower extremity during the April 25, 1995 accident, and the evidence shows that the injury was primarily to the Claimant's right knee. However, it is disputed whether that injury was disabling and whether it caused a worsening of a preexisting back condition.

The Section 20(a) presumption applies to establishing that a claim for compensation comes within the provisions of the Act. 33 U.S.C. § 920. However, the presumption does not assist Claimant in establishing a prima facie case, which must be established before invoking the presumption. ***Devine v. Atlantic Container Lines, G.T.E.***, 23 BRBS 280 (1990). "[A] prima facie 'claim for compensation,' ... must at least allege an injury that arose in the course of employment as well as out of employment." ***U.S. Industries/Federal Sheet Metal v. Director, OWCP (Riley)***, 455 U.S. 608, 615, 14 BRBS 631, 633 (1982). As a general rule, in order to establish a prima facie case that injury arose out of employment, a claimant must establish that (1) the claimant sustained some physical harm and (2) working conditions existed, or an accident occurred, which could have caused the harm. ***See, e.g., Adams v. General Dynamics Corp.,*** 17 BRBS 258, 260 (1985). After the prima facie case is established, a presumption arises under Section 20(a) that the employee's injury or death arose out of his or her employment.

Employer has argued that there are no presumptions applicable in the instant case. That is incorrect. I find that the Claimant has alleged facts that show that he sustained physical harm to his knee (specifically, a tear to the medial meniscus) that presumptively arose from his employment, and I further find that the Employer has failed to rebut that presumption. In fact, the Employer stipulated as much when it agreed that there had been an injury to the right lower extremity, although disputing that arthritis in Claimant's knee was related to the accident. Dr. Thomas Whitten, an orthopaedic surgeon, was the doctor who provided Claimant with most of the treatment for his April 1995 knee injury. While conceding that a significant portion of the Claimant's arthritis (of both the knee and back) was already probably present prior to the accident and that the only knee injury that he sustained at the time of the April 1995 accident was a tear to the meniscus, Dr. Whitten stated that "the arthritic condition that he had, and certainly in the medial or in a part of his knee, was a direct contribution from the torn cartilage and the fact that he delayed treatment of that for over a year" and he further stated that the arthritis was "accident related." (EX 3 at 22, ***see also id.*** at 42-43). Dr. Edward Cohen, the orthopedic surgeon

who examined the Claimant for the Employer, questioned whether the arthritis was aggravated by the Claimant's knee trauma, noting the lack of evidence of such, because "you would have immediate and significant symptoms, which didn't appear to be the case." However, he further indicated that there was no evidence that it was not aggravated by the trauma, either. (EX 2 at 25-26). Under these circumstances, I find that the presumption of causation of the Claimant's knee condition has not been rebutted.

However, I agree with the Employer that the Section 20(a) presumption does not apply to the Claimant's back condition, as there is no evidence that he sustained any type of back injury at the time of the accident in question. Rather, it is Claimant's burden to prove that his existing back condition was caused or aggravated by his knee condition. It would be insufficient for Claimant to establish that such a causal connection is merely possible.

Here, the evidence clearly establishes that the Claimant's back condition arose as a result of his 1992 automobile evidence. There is also no evidence that the Claimant directly injured his back at the time of the 1995 industrial accident in which he sustained physical harm to his knee. Thus, the question is whether the Claimant's knee injury aggravated his back condition, due to the immobilization of the knee and the effect upon Claimant's gait.

As noted above, Dr. Chhabi Bhushan, the neurological surgeon, was the physician who primarily provided treatment to the Claimant for his back impairment. Dr. Bhushan told the Claimant's attorney in a letter of April 23, 1999, that various factors made it difficult for him to form an opinion about whether the right knee affected the Claimant's back. CX 6(d). For example, Dr. Bhushan noted, first, that the results of the MRI performed on November 11, 1996, are enough, standing alone, to explain the pain in the Claimant's low back region. Second, the Claimant had already had his knee surgery before he mentioned his knee accident to Dr. Bhushan for the first time during his last visit. Third, the Claimant had not visited Dr. Bhushan's office between the visit of November 10, 1997, and April 21, 1999, when the Claimant's attorney asked Dr. Bhushan whether the Claimant's limp aggravated his back condition. Finally, according to Dr. Bhushan, the Claimant reported the same symptoms during each visit, despite his claim that the condition was worsening, and Dr. Bhusan further noted the Claimant continued to work during all his visits except the visit of November 10, 1997. (CX 6, EX 4 at 44.) On the other hand, Dr. Bhusan noted that the Claimant's herniated disk would not explain the pain on his right side, and he would not rule out the possibility that the limp caused by his right-knee injury aggravated his preexisting back condition. (EX 4 at 22 to 27, 44).

At his deposition, Dr. Edward R. Cohen, the orthopaedic surgeon who examined the Claimant on behalf of the Employer, did not address the issue of aggravation of the back condition. Instead, he focused on the causation of Claimant's arthritic knee. In fact, he testified that he never even examined Claimant's back. (EX 2 at 18).

The only physicians to squarely address the issue were Dr. Thomas V. Whitten, the orthopedic surgeon who was primarily responsible for treating the Claimant's April 1995 knee injury (CX 2, EX 3) and Dr. D. Graham Slaughter, a neurosurgeon, who examined the Claimant once, on August 4, 1999. (CX 1).

At his September 16, 1999 deposition, Dr. Whitten testified as follows:

> Q. You may have mentioned this and I didn't pick it up, but I see something about a flexion contracture?
>
> A. Yes. What happens is when people have an arthritic condition, because of the persistence of the pain, it becomes harder and harder for them to reach full extension with their knee joint. And what happens is they start to have a subtle change in the knee where it doesn't quite get out straight, it may have five or 10 degrees of lack of extension, which again alters the length of leg, alters the gait and changes the way you walk. And it sometimes can contribute to the back issue.
>
> Q. And did that happen in this case?
>
> A. It did.

(EX 3 at 21-22; ***see also id.*** at 27-28.) However, Dr. Whitten admitted that he had never formally treated Claimant for his back. ***Id.*** at 34.

Similarly, in his report dated August 11, 1999, Dr. Slaughter opined that "the right knee pain immediately following his knee operation produced [an] aggravation of his chronic lumbar spine discomfort in view of the fact that he was not able to walk normally aggravating his scoliosis and degenerative disc disease." (CX 1).

As Claimant notes, the only medical evidence of record supports the causal connection between the Claimant's knee injury and his back condition, by establishing aggravation of his preexisting disability. In view of Employer's failure to introduce any medical evidence to the contrary, I find that the preponderance of the competent evidence shows that the Claimant's back condition symptoms were temporarily aggravated by his knee condition.

What has not been shown, however, is that the aggravation to Claimant's back caused by the Claimant's gait problems was permanent in nature. The medical evidence merely establishes that there was a temporary aggravation of Claimant's back symptoms during his recuperation period – what Dr. Slaughter described as "an aggravation of his chronic lumbar spine **discomfort**." It does not, however, provide a basis for determining that the Claimant has a permanent worsening of his underlying back condition as a result

of the 1995 accident.

Based upon the above, I find that the Claimant has established a causal connection between his work injury and knee condition by operation of the Section 20(a) presumption, which has not been rebutted, and I further find that the Claimant has directly established that his knee condition aggravated his back symptomatology, by the unrefuted opinions of Drs. Whitten and Slaughter to that effect, but the Claimant has not shown that the aggravation was permanent in nature. On the issue of medical benefits under Section 7 of the Act, 33 U.S.C. § 907, the Claimant would be entitled to medical treatment for the back condition during the period of time that it was aggravated by his knee disability.

Entitlement to Benefits Based Upon Disability

According to the Act, "'[d]isability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Total disability would thus be complete incapacity to earn pre-injury wages in the same work as at the time of injury or in any other employment. Under current case law, the employee has the initial burden of proving total disability. To establish a ***prima facie*** case of total disability, a claimant must show that he or she cannot return to his or her regular or usual employment due to a work-related injury. ***New Orleans (Gulfwide) Stevedores v. Turner***, 661 F.2d 1031 (5th Cir. 1981); ***Armfield v. Shell Offshore, Inc***., 25 BRBS 303, 305 (1992).

A worker entitled to permanent partial disability for injuries arising under the schedules may be entitled to greater compensation under Sections 8(a) and (b) by showing that he is totally disabled. ***Potomac Electric Power Co. v. Director, OWCP***, 449 U.S. 268, 277 n. 17, 14 BRBS 363 (1980). However, unless a worker is totally disabled, he or she is limited to the compensation provided by the appropriate schedule provision. ***Winston v. Ingalls Shipbuilding***, 116 BRBS 168, 172 (1984).

Permanent Partial Disability

I find that the applicable schedule for Claimant's injury is that related to the leg (or right lower extremity, which includes the knee), 33 U.S.C. § 908(c)(2). Permanent partial disability compensation under the schedule of Section 8(c) is to be paid at a weekly rate equal to two-thirds of the employee's average weekly wage at the time of injury. 33 U.S.C. § 908(c). The duration of compensation is determined by the part of the body injured. Pursuant to Section 8(c)(19), partial loss of use of a scheduled body part may be compensated in proportion to the percentage loss of that body part. 33 U.S.C. § 908(c)(19). The Board and circuit courts have long held that under Section 8(c)(19), a scheduled award for partial loss of use runs for the proportionate number of weeks attributable to the loss of use of the member at the full compensation rate of two-thirds of the average weekly wage. ***Nash v. Strachan Shipping Co.***, 15 BRBS 386, 391 (1983),

aff'd in relevant part but rev'd on other grounds, 760 F.2d 569, 17 BRBS 29 (CRT) (5th Cir. 1985), ***aff'd on recon. en banc***, 782 F.2d 513, 18 BRBS 45 (CRT) (5th Cir. 1986).

Claimant has not addressed the issue of extent of permanent partial disability of the knee, relying instead on the argument that the Claimant is totally disabled. Employer has addressed the issue but has sought to exclude the component of the knee injury attributable to arthritis from the equation. The evidence on this issue includes the opinion of Dr. Edward Cohen to the effect that the Claimant has a 25 percent permanent partial disability to his right leg under the AMA Guides, at least half of which was attributable to the preexisting changes, meaning that at most 12 percent was attributable to the April 1995 accident. (EX 2 at 17-18). Dr. Whitten found the Claimant to have a disability of 30 percent, of which 10 percent was preexisting, resulting in an impairment of 15 to 20 percent attributable to the accident. (EX 3 at 35-36). As noted above, I have found that the Claimant's arthritis was aggravated by his knee injury, and therefore an assessment of degree of disability should be based upon the entire impairment to the leg. Drs. Cohen and Whitten agree fairly closely on this issue, and as Dr. Whitten conceded that his estimate could be off by five percent, I will adopt Dr. Cohen's finding of a 25 percent impairment, half of which was preexisting.

Based upon the twenty-five percent (25%) impairment of his right foot, Claimant would be entitled to a period of scheduled permanent partial disability lasting 72 weeks (25% of 288 weeks). ***See*** 33 U.S.C. § 908(c)(4), 908(c)(19). However, this finding is not applicable if Claimant is found to be permanently and totally disabled.

Inability to Perform Usual Employment

In order to make a determination of whether a claimant has made a ***prima facie*** showing of total disability, the administrative law judge must compare the claimant's medical restrictions with the requirements of his or her usual employment. ***Curit v. Bath Iron Works Corp.***, 22 BRBS 100 (1988); ***Mills v. Marine Repair Serv.***, 21 BRBS 115, ***on recon.***, 22 BRBS 335 (1988); ***Carroll v. Hanover Bridge Marine***, 17 BRBS 176 (1985); ***Bell v. Volpe/Head Constr. Co.***, 11 BRBS 377 (1979). Usual employment is defined as the claimant's regular duties at the time that he or she was injured. ***Ramirez v. Vessel Jeanne Lou, Inc.***, 14 BRBS 689 (1982). A claimant's credible complaints of pain alone may be enough to meet the claimant's ***prima facie*** burden. ***Anderson v. Todd Shipyards Corp.***, 22 BRBS 20 (1989); ***Richardson v. Safeway Stores***, 14 BRBS 855 (1982); ***Miranda v. Excavation Constr.***, 13 BRBS 882, 884 (1981); ***Golden v. Eller & Co.***, 8 BRBS 846 (1978), ***aff'd***, 620 F.2d 71 (5th Cir. 1980).

The medical evidence establishes that the Claimant is no longer capable of performing his usual longshore job of "gear man" as he is no longer capable of climbing on

a frequent or sustained basis.[21] Specifically, Dr. Platt testified that Claimant cannot work as a longshoreman, primarily because of his knee, and that the knee condition alone would be disabling (EX 5 at 14-15, 24-26); Dr. Whitten testified that Claimant's knee condition, alone, was enough to prevent Claimant from returning to his previous line of work (EX 3 at 32); Dr. Bhushan stated that the Claimant could not work due to pain in his back and right knee, assuming that he still has the symptoms that he had when he was last examined in November 1997 (EX 4 at 42-43, 47); Dr. Slaughter opined that the Claimant could not return to any "labor intense" occupation because of his knee and back injuries and that he would be unable to work as a longshore worker (CX 1). To the contrary, Dr. Cohen opined that the Claimant could return to his previous job and that he would be able to climb ladders, but he admitted to not knowing the specific job requirements. (EX 2 at 28-29). Looking at all of this medical evidence, I find that the weight of it establishes that the Claimant could not return to his job as a gear man in view of the ladder climbing required.

Suitable Alternative Employment

Since the Claimant has met his ***prima facie*** showing, the burden now shifts to Employer to show suitable alternative employment. ***Clophus v. Amoco Prod. Co.***, 21 BRBS 261 (1988); ***Nguyen v. Ebbtide Fabricators***, 19 BRBS 142 (1986). As a general rule, in order to show suitable alternative employment, Employer must show the existence of realistically available job opportunities within the geographical area where Claimant resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. ***Trans-State Dredging v. Benefits Review Bd. (Tarner)***, 731 F.2d 199 (4th Cir. 1984). ***See also Edwards v. Director, OWCP***, 99 F.2d 1374 (9th Cir. 1993); ***cert. denied***, 114 S.Ct. 1539 (1994). The employer is not required to act as an employment agency for the claimant. However, the employer must prove the availability of actual, not theoretical, employment opportunities by identifying specific jobs available to the claimant in the community. ***Bumble Bee Seafoods v. Director, OWCP***, 629 F.2d 1327, 1330, 12 BRBS 660, 662 (9th Cir. 1980); ***Armfield v. Shell Offshore, Inc.***, 30 BRBS 122, 123 (1996); ***Salzano v. American Stevedores***, 2 BRBS 178 (1975), ***aff'd*** 538 F.2d 933, 4 BRBS 195 (2d Cir. 1976). ***But see New Orleans (Gulfwide) Stevedores v. Turner***, 661 F.2d 1031, 1042-43, 14 BRBS 156, 164-65 (5th Cir. 1981) (requiring demonstration of general availability of jobs). In order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and it is realistically available, the employer must establish the precise nature and terms of job opportunities it contends constitute suitable alternative employment. ***Piunti v. ITO Corporation of Baltimore***, 23 BRBS 367, 370 (1990); ***Thompson v. Lockheed Shipbuilding & Construction Company***, 21 BRBS 94, 97 (1988). If the employer cannot show suitable

[21] Although Claimant returned to work for 2 1/2 days in May or June of 1997, I do not find this temporary, unsuccessful effort to be of significance, except that temporary total disability (TTD) cannot be paid during the period of time that he received wages.

alternative employment, then Claimant is permanently and totally disabled. ***Manigault v. Stevens Shipping Co.***, 22 BRBS 332 (1989). If suitable alternative employment is shown, then the burden shifts back to Claimant to establish a diligent search and willingness to work. ***Williams v. Halter Marine Serv.***, 19 BRBS 248 (1987).

The Employer has submitted a labor market survey dated August 27, 1999 that takes into account the restrictions placed upon Claimant by Drs. Whitten and Cohen ("employment opportunities that do not require extensive walking or climbing", EX 6 at 47). In assessing this survey, I note that the Claimant did not make himself available to participate and provide information, and that no rebuttal vocational evidence has been submitted. The survey is somewhat flawed in that it assumes that the Claimant had a "high school level of education" when, in fact, he did not (possessing only a seventh grade education). However, the Claimant is partly responsible for this lack of information, in view of his failure to meet with the vocational counselors. (EX 6). Moreover, while the incorrect educational assumption is a factor to take into consideration in weighing this evidence, it is not a fatal flaw, as some of the jobs identified require "minimal education", according to the survey, and are sedentary in nature. An example is certain Parking Lot Attendant/Booth Cashier positions, which pay from $5.15 to $7 hourly and which are consistent with the restrictions placed upon the Claimant by Dr. Whitten, the physician who treated him for his knee injury, as well as by Dr. Cohen. However, as the survey does not indicate which, if any, of these positions do not require a high school diploma, and in view of the fact that Claimant's ability to obtain employment would be limited by his seventh grade education, the hourly wage should be at the low end of the scale, or $5.15 hourly.

Considering the above, I find that Employer has demonstrated realistically available job opportunities within the geographical area where Claimant resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried, and that his current wage earning capacity is $5.15 hourly.

Lack of Diligence in Search for Employment

As Employer has established the availability of suitable alternate employment, the burden therefore shifts to the Claimant to establish a diligent search and willingness to work. In addressing this issue, I must make specific findings regarding the nature and sufficiency of Claimant's efforts. ***See Palombo v. Director, OWCP,*** 937 F.2d 70, 25 BRBS 1 [CRT] (2d Cir. 1991).

I find that Claimant has failed to establish a diligent search and willingness to work based upon his search for employment, which only extended over one week. Even Claimant's account of this short employment search reveals a lackluster effort on the part of the Claimant. While I do not totally discount Claimant's testimony, I do not find the Claimant to be a particularly credible witness. Notably, he has reported 33 incidents of

work-related injuries and has filed between two and seven claims with the Department of Labor, but has provided no explanation for this unusual number of reports. Claimant's credibility is also undermined by his use of a cane in court and while attending a medical examination by Employer's doctor, as compared with other times shown on the surveillance videotapes when he does not use a cane. Thus, I find

that the Claimant has failed to establish a diligent search or the unavailability of suitable alternative employment.

Calculation of Benefits

Total disability benefits (both temporary and permanent)[22] are payable in the amount of 2/3 ("66 2/3 per centum") of a claimant's average weekly wage during the continuance of the disability. 33 U.S.C. § 908(a), (b). Total disability becomes partial on the earliest date that the employer establishes the availability of suitable alternate employment (not the date of maximum medical improvement.) ***Rinaldi v. General Dynamics Corp.,*** 25 BRBS 128, 131 (1991). The claimant is entitled to total disability benefits from the onset of such disability until permanent partial disability benefits, if any, are payable. An award for permanent partial disability (for a non-scheduled disability) is based on the difference between the pre-injury average weekly wage and the post-injury wage-earning capacity. 33 U.S.C. § 908(c)(21). Benefits are paid at a rate of 2/3 of the loss of wage earning capacity. ***Id.***

Here, except for the short time that he worked, Claimant is entitled to temporary total disability benefits until the date of maximum medical improvement, followed by permanent total disability benefits payable until the date of suitable alternative employment, followed by permanent partial disability benefits, based on his schedular knee injury. The Claimant reached maximum medical improvement (MMI) for his knee injury on August 11, 1997, according to Dr. Whitten (EX 3 at 23-24). The parties stipulated that the Claimant was temporarily totally disabled until May 18, 1997 and that Claimant's temporary total disability rate of compensation would be the maximum rate for the pertinent period ($760.92). The Claimant's average weekly wage at the time of the accident was $1,447.82, and his postinjury wage earning capacity is $210.00, for a loss of wage earning capacity of $1,237.82, payable at a rate of $825.21, which would exceed the maximum compensation rate. However, as a schedular injury is involved here, the wage earning capacity is not relevant and benefits are paid on the basis of the schedule, as discussed above.

In view of the above, I find that the Claimant is entitled to temporary total disability benefits from the time he stopped working (on November 19, 1996) until he reached MMI (August 11, 1997); permanent total disability benefits from August 12, 1997 until the date of the labor market survey (August 27, 1999); and schedular permanent partial disability benefits thereafter for a period of 72 weeks (25% of 288 weeks), payable at an amount not to exceed the maximum compensation rate of $760.92 (200 per cent of the applicable national average weekly wage for the date of injury), in accordance with section 6 of the

[22] Disability is deemed to be temporary until maximum medical improvement (MMI) is achieved, at which point disability is permanent.

Act, 33 U.S.C. § 906(b)(1). However, the

Claimant should not receive benefits for the days that he worked, to the extent that he received wages.

Section 8(f) Relief

As noted above, the Employer/Insurer filed a petition for relief under Section 8(f) of the Act (33 U.S.C. § 908(f)) on April 26, 1999, because the Claimant had preexisting conditions at the time of the 1995 accident to his right knee, and the District Director denied the application on May 17, 1999 "based upon the lack of agreement on the issue of nature and extent of permanent disability." In support of the application, Employer noted, inter alia, that Claimant sustained right knee and/or leg injuries in industrial accidents of January 19, 1970, January 3, 1973, July 3, 1974, March 14, 1978, December 22, 1978, and March 27, 1984. In the last of these, he was awarded a 1% permanent partial disability to his right leg, based upon his knee injury. As previously discussed, the Claimant had arthritic changes in his knee predating the 1995 accident. Claimant also sustained a back and other injuries during an automobile accident of December 1, 1992, the treatment for which is discussed above. EX7 at 64 to 73. EX7 at 63.

To qualify for Section 8(f) relief, an employer must show the following: (1) the employee had a preexisting permanent partial disability; (2) this preexisting disability was manifest to the employer prior to the subsequent injury; and (3) the second injury alone would not have caused the claimant's current level of disability. ***See Director, OWCP v. Luccitelli***, 964 F.2d 1303, 1305 (2d Cir. 1992).

With respect to the first element, in order for an employer to establish a preexisting partial disability, it must show that a claimant had a physical disability that would motivate a cautious employer to discriminate against the handicapped employee for fear of increased liability for compensation. ***Director, OWCP v. General Dynamics Corp.***, 982 F.2d 790, 796 (2d Cir. 1992) (***citing C & P Tel. Co. V. Director, OWCP***, 564 F.2d 503, 513 (D.C. Cir. 1977)). While lifestyles, habits, and the aging process are not, in and of themselves, preexisting disabilities, any physical impairments, diseases, or conditions which are the **result** of lifestyles, habits, or the aging process may constitute preexisting disabilities. For example, degenerative disc disease may be a preexisting disability. ***Greene v. J.O. Hartman Meats***, 21 BRBS 214, 216-18 (1988). The facts set forth above clearly establishes a preexisting partial disability of the knee.

The second element -- that Employer must show that the preexisting disability was manifest -- is not a statutory requirement, but has been regularly imposed "by all federal circuit courts which have addressed the issue." ***Stone v. Newport News Shipbuilding & Dry Dock Co.***, 20 BRBS 1, 5 n.2 (1987). According to the Fourth Circuit:

> The manifestation requirement places on the employer the burden of showing that at the time of hiring or during the period of employment the

> employee suffered from some existing medical disability or handicap that predated any occupational injury and contributed to or aggravated the occupational injury. It is not required that the employer have actual knowledge of the preexisting condition, only that the knowledge of the preexisting condition be available to the employer when the period of employment begins or at some point during the period of employment, for example from existing medical records. ***See Lambert's Point Docks, Inc. v. Harris***, 718 F.2d 644 (4th Cir.1983).

Newport News Shipbuilding and Dry Dock Co. v. Harris, 934 F.2d 548, 553 n. 3 (4th Cir. 1991). Here, the worker's compensation claims filed, and particularly the 1% right leg disability award, make it clear that the knee injury was manifest.

Finally, under the third element, Employer must prove that one or more of the preexisting permanent partial disabilities contributed to Claimant's disability in order to show eligibility for section 8(f) relief. ***Two "R" Drilling Co. v. Director, OWCP***, 894 F.2d 748, 750 (5th Cir. 1990). When the combination of the claimant's preexisting disability and the new injury or aggravation results in permanent partial disability rather than permanent total disability, the employer must also establish that the resultant disability is materially and substantially greater than that which would have otherwise been expected. ***See, e.g., Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.***, 8 F.3d 175 (4th Cir. 1993); ***Quan v. Marine Power & Equip. Co., 30 BRBS 124 (1996); Lockheed Shipbuilding v. Director, OWCP***, 951 F.2d 1143, 1144 (9th Cir. 1991). I find that the testimony of Drs. Whitten and Cohen, discussed above,[23] establishes that the Claimant's current knee disability was materially and substantially contributed to both by the preexisting condition and by the 1995 industrial accident.

Because the Director has not responded to Employer's petition (and I have not requested a response by the Director), the issue that I will address is whether the Employer has made a ***prima facie*** showing of entitlement to section 8(f) relief. For the reasons set forth above, I find that it has done so. Accordingly, I will remand this matter for consideration of the section 8(f) petition in light of the additional evidence now available.

Attorneys Fees

Claimant's attorney shall have thirty (30) days after receipt of this Decision and Order to submit a fee petition and bill of costs and the Employer's attorney shall have thirty (30) days to file any objections. ***See generally*** 33 U.S.C. § 928; 20 C.F.R. §§ 702.131 -

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[23] Dr. Whitten found approximately 10% of the resultant 30% disability attributable to preexisting conditions and 15 to 20% attributable to the 1995 accident, while Dr. Cohen found that at least half of the Claimant's resultant 25% disability was attributable to preexisting conditions, while approximately 12% was attributable to the 1995 accident.

702.135; 33 U.S.C. § 928(d). The issue of attorneys fees and costs will be addressed in a supplemental decision and order.

ORDER

IT IS HEREBY ORDERED that the Claimant's claims for temporary/permanent total disability and permanent partial disability benefits are **GRANTED** to the extent set forth above; and Claimant's claims for disability compensation are otherwise **DENIED**; and

IT IS FURTHER ORDERED that Employer/Carrier's petition for section 8(f) relief is **REMANDED** for reconsideration by the District Director; and

IT IS FURTHER ORDERED that Claimant's attorney shall file a fully supported and itemized petition for attorney fees and costs within thirty (30) days of receipt of this Decision and Order, and the employer shall file any objections within thirty (30) days of service of Claimant's petition.

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PAMELA LAKES WOOD
Administrative Law Judge

Date: January 12, 2001